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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

RECUPEROS, LLC, an Idaho limited liability company,

Plaintiff,

vs.

AMERICAN FOOD STORES, LLC, a California limited liability company,

Defendant.

AMERICAN FOOD STORES, LLC, a California limited liability company,

Counterclaimant,

vs.

RECUPEROS, LLC, an Idaho limited liability company,

Counterdefendant.

Civil No. 04-229-S-BLW

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE

ORIGINAL

I. INTRODUCTION

On or about August 13, 2004, the movant and would-be intervenor, Tej Pahwa, through counsel, filed a motion to intervene in the above-captioned matter, expressly seeking to intervene as a matter "of right" pursuant to Fed. R. Civ. P 24(a). In short, Mr. Pahwa has claimed an interest in the money at issue in the pending action for declaratory relief and now seeks leave of the Court to intervene, claiming that if plaintiff is required to return the earnest money deposit at issue herein, $296,155.15 of that deposit should rightfully be returned to him and not defendant. Following the motion to intervene, counsel for American Food Stores moved on or about August 18, 2004, for leave to withdraw as defendant's counsel of record. *See* Docket No. 32. On August 23, 2004, the Court entered its order granting the motion to withdraw and imposing a 20-day stay from the filing of proof of service of said order to all parties. *See* Docket No. 34. An affidavit of mailing was filed with the Court by the withdrawing attorney on August 30, 2004, which established that the 20-day stay would remain in effect until September 19, 2004. *See* Docket No. 35. Plaintiff now submits its memorandum in opposition to the motion to intervene filed by Mr. Pahwa prior to the stay, and submits that for the reasons forth below, the motion to intervene should be denied.

II. SCOPE OF REVIEW

The question whether a party should be allowed to intervene as a matter of right under Federal Rule of Civil Procedure 24(a) is a question of law. *See United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986). Traditionally, an order denying a party intervention of right is given *de novo* review, since the facts at issue have been already established, and the issue primarily involves consideration of legal concepts. *See id.* The more modern trend, however, is to review intervention rulings, whether they be on motions for

intervention of right or for permissive intervention, under an abuse of discretion standard, with several Circuit Courts of Appeal noting that the trial court is better situated to determine the various factors involved. *See United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994); *Mountain Top Condominium Ass'n v. Dave Stabbert Masterbuilder,* 72 F.3d 361, 365 (3d Cir. 1995).

III. ANALYSIS

Motions for intervention are governed by Federal Rule of Civil Procedure 24, which provides, in pertinent part:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> **(b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

In determining whether intervention is appropriate, courts are guided primarily by practical and equitable considerations. *Turn Key Gambling, Inc. v. Oglala Sioux Tribe*, 164 F.3d 1080, 1081 (8th Cir. 1999).

A. The Would-Be Intervenor Lacks Standing To Intervene.

There is a split in authority among the various circuit courts as to whether a party seeking intervention as of right must also possess Article III standing. *Compare Ruiz v. Estelle*, 161 F.3d 814, 829-33 (5th Cir. 1998) *with Mausolf v. Babbitt*, 85 F.3d 1295, 1299-1300 (8th Cir. 1996); *see also Rio Grande Pipeline Co. v. F.E.R.C.*, 178 F.3d 533, 538 (D.C. Cir. 1999). Despite the split among the federal circuits, however, it is generally agreed that "at some fundamental level the proposed intervenor must have a stake in the litigation." *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000). There is not as yet any clear definition, either from the United States Supreme Court or from the circuit courts of appeal, regarding the nature of the "interest relating to the property or transaction which is the subject of the action" required for intervention of right. The Supreme Court has at least indicated, however, that standing under Article III is a factor to be addressed in determining whether intervention under Rule 24 will be allowed. Specifically, the Court noted:

> This Court has recognized that certain public concerns may constitute an adequate "interest" within the meaning of Federal Rule of Civil Procedure 24(a)(2) .... However, the precise relationship between the interest required to satisfy the Rule and the interest required to confer standing, has led to anomalous decisions in the Courts of Appeals. We need not decide today whether a party seeking to intervene before a District Court must satisfy not only the requirements of Rule 24(a)(2), but also the requirements of Art. III. To continue this suit in the absence of Illinois, Diamond himself must satisfy the requirements of Art. III. The interests Diamond asserted before the District Court in seeking to intervene plainly are insufficient to confer standing on him to continue this suit now.

Diamond v. Charles, 476 U.S. 54, 106 S. Ct. 1697, 1707, 90 L. Ed. 2d 48 (1986) (internal citations and footnote omitted).

Regardless of the split among the circuit courts on this issue, all courts agree that an order granting intervention does not itself confer standing sufficient to continue a case after it is otherwise terminated as between the original parties. *See Diamond, supra*, 476 U.S. at 68. *See also Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271, 1278 (11th Cir. 2000). Given the Supreme Court's treatment of Article III standing in the context of Rule 24 intervention, particularly the Court's indication that in order for an intervening party to continue the lawsuit in the absence of one of the original parties the intervenor "must satisfy the requirements of Article III," it certainly appears that if the Supreme Court is called upon to ultimately decide the issue, Article III standing would indeed be a prerequisite.

As this Court is well aware, standing is a judicially-developed doctrine designed to ensure that a court existing under Article III of the Constitution is presented by parties before it with an actual case or controversy. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 2210, 45 L. Ed. 2d 343 (1975). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) ("standing is an essential and unchanging part of the case-or-controversy requirement of article III") (citing *Allen v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 3324, 82 L. Ed. 2d 556 (1984)). In this case, the would-be intervenor simply does not have a sufficient stake in the pending litigation between plaintiff Recuperos, LLC and defendant American Food Stores, LLC. The relief sought by the movant has nothing to do with the issue pending before the Court; that is, whether plaintiff is entitled to the earnest money deposit at issue. Indeed, as the Complaint in Intervention plainly states, Mr. Pahwa allegedly provided the money to defendant American Food Stores "so that it could make the [earnest money] deposit to plaintiff Recuperos, LLC." Movant has not, and indeed *cannot,* include a claim against plaintiff directly, as there is no privity of contract, nor is there any other legally cognizable claim by

Mr. Pahwa against Recuperos. Mr. Pahwa's claim as a would-be intervenor, by its very nature, cannot amount to the type of interest required under Rule 24(a)(2), much less a justiciable case or controversy under Article III, until a determination is first made whether plaintiff is entitled to retention of the earnest money deposit. Regardless of the outcome of plaintiff's claim against American Food Stores, this case clearly falls within the type of situation addressed by the Supreme Court in *Diamond v. Charles, supra.* Herein, the intervenor's claim to the earnest money will not materialize until the underlying dispute between Recuperos and American Food Stores is determined, since a determination that Recuperos is entitled to keep the earnest money per the parties' earlier agreement will render Pahwa's claim moot. Simply put, one of two scenarios will occur in the pending action for declaratory relief: 1) either Recuperos will be deemed entitled to the earnest money deposit, leaving not only defendant, but the would-be intervenor as well, with no claim to the disputed funds; or 2) Recuperos will be required to return the deposit to defendant, at which point Mr. Pahwa will be free to pursue an action for legal or equitable relief against American Food Stores. Either way, Recuperos' involvement in the matter must necessarily be resolved before the movant has a valid claim to that portion of the earnest money to which he claims entitlement. As such, until the declaratory action is determined, the intervenor does not have a justiciable claim under Article III, the Complaint in Intervention is premature, and the motion to intervene should be denied.

B. The Would-Be Intervenor Is Unable To Meet the Required Showing Under Rule 24(a)(2) for Intervention of Right.

A motion to intervene meets the requirements of Rule 24(a)(2) *only* if: (1) the motion is timely; (2) the movant asserts an interest relating to the property or transaction that is the subject of the action; (3) without intervention the disposition of the action would as a

practical matter impair or impede the movant's ability to protect that interest; and (4) that interest is inadequately represented by the parties to the action. *See Petrol Stops Northwest v. Cont'l Oil Co.*, 647 F.2d 1005, 1009 (9th Cir. 1981) (citing *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980)). For a motion to intervene based on Rule 24(a)(2) to be granted, the Ninth Circuit has determined that all four elements set forth above must be met. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997). For the reasons set forth more fully below, plaintiff submits that intervention under Rule 24(a)(2) should not be granted in this matter.

1. The movant's application is untimely.

Timeliness of an application for intervention "stands as a sentinel at the gates whenever intervention is requested and opposed." *Banco Popular de Puerto Rico v. Greenblatt*, 964 F.2d 1227, 1230 (1st Cir. 1992). As the Ninth Circuit has noted, timeliness is a threshold question addressed to the sound discretion of the trial court, reviewable only for abuse of that discretion. *See Yniguez v. State of Ariz.*, 939 F.2d 727, 731 (9th Cir. 1991). The Ninth Circuit generally considers three factors relevant to the issue of timeliness: (1) the stage of the litigation at the time of application; (2) the prejudice of the existing parties if the application is granted; and (3) the reason for the length of delay, if any. *See United States v. State of Wash.*, 86 F.3d 1499, 1502 (9th Cir. 1996). In considering these factors, "any substantial lapse of time weighs heavily against intervention." *See League of United Latin Am. Citizens*, 131 F.3d at 1302. Further, the Ninth Circuit has noted that when the district court has already substantially engaged the issues in the case, as when addressing motions for injunctive relief, such engagement weighs heavily against allowing intervention. *See League of United Latin Am. Citizens*, 131 F.3d at 1303.

Here, as the Court is certainly well aware, the substantive issues of this matter have been previously addressed at some length through plaintiff's motion for injunctive relief and to expunge several improperly recorded lis pendens. As one court has noted, timeliness is "essentially a reasonableness inquiry, requiring potential intervenors to be reasonably diligent in learning of a suit that might affect their rights, and upon learning of such a suit to act to intervene reasonably promptly." *People Who Care v. Rockford Bd. of Educ.*, 68 F.3d 172, 175 (7th Cir. 1995). Plaintiff submits that there is certainly a question regarding the reasonableness of Mr. Pahwa's attempt to intervene in this matter. Although the substantive issues of the case have not been disposed at this point, Mr. Pahwa's late arrival in the matter will indeed unreasonably cause a change in litigation strategy, which, as will be shown in greater detail below, is ultimately unnecessary until the final disposition of the pending lawsuit.

2. The movant lacks sufficient interest in the property and transaction involved in the pending lawsuit.

It is generally accepted that a would-be intervenor need not have a specific legal or equitable interest in jeopardy, but must instead show "a protectable interest of sufficient magnitude to warrant inclusion in the action." *Smith v. Pangilinan*, 651 F.2d 1320, 1324 (9th Cir. 1981). However, a mere economic stake in the pending litigation is not sufficient under Rule 24(a)(2). *See Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993).

The Ninth Circuit has described the "interest" test as requiring both "an interest protected under some law" and a "relationship" between that interest and the claims at issue. *Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1494 (9th Cir. 1995). While there are no Ninth Circuit cases directly on point in addressing the *sufficiency* of the interest required under Rule 24(a)(2), the case of *Hawaii-Pacific Venture Capital Corp. v.*

Rothbard, 564 F.2d 1343 (9th Cir. 1977), is particularly instructive. In the *Rothbard* matter, the Ninth Circuit found that a creditor with an unliquidated claim generally does not have a sufficient interest to intervene in an action brought by another creditor against the debtor, even though such denial would affect the collectability of future judgments obtained against that debtor. *See id.* at 1346. In addition, the Ninth Circuit has found that there is no cognizable or legally protectable interest when the asserted economic interest is "based upon a bare expectation." *See Sierra Club v. United States Envtl. Prot. Agency*, 995 F.2d 1478, 1482 (9th Cir. 1993), distinguishing *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989).

In the pending matter, as in *Portland Audubon Society*, the would-be intervenor's interest is nothing more than a "bare expectation" and is not based upon a currently existing legal right. Specifically, the complainant/intervenor only claims that "*in the event* there is an adjudication herein that the aforesaid deposit should be disgorged by plaintiff, intervenor Pahwa seeks further adjudication that such money be returned to him . . . ." *See* Complaint in Intervention at ¶ 3 (emphasis added). Having failed to establish a "significantly protectable interest relating to the property or transaction involved in the pending lawsuit" the intervenor is unable to establish all of the necessary elements required under Rule 24(a)(2) and the relevant case law, and the motion should be denied.

3. Disposition of the lawsuit without the would-be intervenor will not impair or impede his ability to protect the claimed interest.

The third showing required of the movant in establishing entitlement to intervention of right is that the disposition of the lawsuit may adversely affect the applicant's interest unless intervention is allowed. Specifically, Rule 24(a)(2) says that intervention will be allowed when the applicant is "so situated that the disposition of the action may as a practical

matter impair or impede the applicant's ability to protect that interest." In addressing this element, the Ninth Circuit has specifically noted that an added impairment or delay is not a sufficient impairment to justify intervention of right. Specifically, "mere inconvenience . . . caused by requiring [a party] to litigate separately is not the sort of adverse practical effect contemplated by Rule 24(a)(2)." *Blake v. Pallan*, 554 F.2d 947, 954 (9th Cir. 1977). Further, as was the case in *Cunningham v. David Special Commitment Ctr.* 158 F.3d 1035 (9th Cir. 1998), an adjudication concerning plaintiff's entitlement to the earnest money deposit "would resolve nothing concerning [the would-be intervenor's] right." *Id.* at 1038. In particular, Mr. Pahwa's asserted right to recovery of the funds that he provided to defendant has nothing to do with the issue of whether plaintiff is entitled to retention of the earnest money deposit. Accordingly, the Ninth Circuit's third element in establishing intervention of right cannot be shown in this matter.

4. The would-be intervenor's interests are adequately represented by the existing parties.

As noted above, the fourth and final element required by the Ninth Circuit is a showing that the interest asserted in intervention is inadequately represented by the existing parties. *Petrol Stops Northwest*, 647 F.2d at 1009. The adequacy of interest requirement "is more than a paper tiger. A party that seeks to intervene as of right must produce some tangible basis to support a claim of purported inadequacy." *Pub. Serv. Co. of N.H. v. Patch*, 136 F.3d 197, 207 (1st Cir. 1998). If the "ultimate objective" of an existing party is the same as that of the would-be intervenor, the Ninth Circuit has found a presumption of adequate representation. *See Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996), citing *Or. Envtl. Council v. Or. Dep't of Envtl. Quality*, 775 F. Supp. 353, 359 (D. Or. 1991); *Am. Nat'l Bank & Trust Co. of Chicago v. City of Chicago*, 865 F.2d 144, 148 n.3 (7th Cir. 1989). Here, it

is abundantly clear that the "ultimate objective" of the would-be intervenor is precisely the same as that of the current defendant, American Food Stores, LLC. That is, both parties seek return of the earnest money deposit from the plaintiff. As such, the presumption of adequacy of representation should apply in this matter, and the motion to intervene should be denied.

Alternatively, a consideration of the factors enumerated by the Ninth Circuit in determining whether there is adequate representation of the would-be intervenor's interest will lead to the same result; namely, that the motion should be denied.

When deciding the issue of adequate representation by the existing parties, the Ninth Circuit will consider: (1) whether the interest of a present party is such that it will undoubtedly make all of the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect. *See Northwest Forest Resource Council*, 82 F.3d at 838, citing *Cal. v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986).

Considering the first element set forth above, there can be little question that the current defendant will "undoubtedly" make the same argument put forth by the intervenor. Specifically, defendant and intervenor are both arguing for the return of the earnest money deposit. Further, both defendant and the would-be intervenor appear to be capable of and willing to make the same argument, and there is no indication that Mr. Pahwa would add any necessary element to the suit that will otherwise be neglected. In fact, the only additional element that Mr. Pahwa would add to the suit would be his claim that he is entitled to return of the earnest money deposit from defendant American Food Stores, LLC, not from plaintiff Recuperos, LLC.

In light of the foregoing, there is no evidence that the existing parties to the lawsuit will not adequately represent the would-be intervenor's interest. A distinction needs to be made between (1) the intervenor's interest in return of the earnest money deposit from defendant American Food Stores, and (2) the interest of defendant in the return of that deposit from plaintiff. In order for Mr. Pahwa's interest in the disputed funds to become legally enforceable, defendant would first need to prevail in the action for declaratory relief. Pahwa has no cause of action against Recuperos, since even though he may have been defendant's source of the earnest money, Pahwa was not in privity with the plaintiff through either the earnest money agreement, the purchase agreement, or the settlement agreement by which plaintiff became entitled to the earnest money. As such, the intervention of Mr. Pahwa will add nothing to the litigation and will instead unnecessarily and unreasonably require Recuperos to engage in an expanded litigation which ultimately has no bearing upon the legal issues at bar. As a result, the motion to intervene should be denied.

C. Granting of the Motion To Intervene Would Destroy the Diversity of Citizenship that Forms the Jurisdictional Basis of This Case.

As a general matter, Rule 24 does not alter or displace subject matter jurisdiction requirements. *See* FED. R. CIV. P. 82; *see also Aeronautical Radio, Inc. v. F.C.C.*, 983 F.2d 275 (D.C. Cir. 1993). Where original jurisdiction of the underlying lawsuit rests solely on diversity grounds, supplemental jurisdiction does not extend to persons proposed to be joined as plaintiffs or to claims by plaintiffs against persons made parties under Rule 24. *See Dev. Fin. Corp. v. Alpha Housing & Health Care, Inc.*, 54 F.3d 156, 159 (3d Cir. 1995). In either of the above cases, an independent basis for federal jurisdiction must be established for the intervenor's claim to be permitted. *See id.*

In determining whether the intervenor will be treated as a plaintiff or defendant, the court "must penetrate the nominal party alignment" and must furthermore "consider the parties' actual adversity of interest." *Id.* For these purposes, an intervening plaintiff is "a party who voluntarily chooses to intervene in an ongoing federal action to assert its own affirmative claims." *MCI Telecomms. Corp. v. Logan Group, Inc.*, 848 F. Supp. 86, 88-89 (N.D. Tex. 1994). By way of contrast, a "defendant" intervenor is one who intervenes "to defend or protect interests put in issue by the federal action and likely to be lost without the party's intervention." *Id.* at 88-89.

With respect to the pending action, it is clear that the intervenor is attempting to intervene as a plaintiff. First, the intervenor is asserting an "affirmative claim," in that he is apparently demanding that American Food Stores, LLC, return to him the sum of $296,155.15 "in the event there is an adjudication herein that the aforesaid deposit should be disgorged by plaintiff." *Amended Complaint in Intervention*, ¶ IV (Dkt. No. 37). Secondly, the "affirmative claim" set forth in the Amended Complaint in Intervention is leveled not at plaintiff, but at the defendant, since the return of the $296,155.15 will come from American Food Stores, LLC, and not from Recuperos, LLC. Specifically, the amended complaint claims that *if* the earnest money must be disgorged by plaintiff, *then* there must be "*further* adjudication" requiring defendant to return the $296,155.15 to the movant. *See id.* (emphasis added). Thus, not only is there an "affirmative claim," indicating that the movant is intervening as a plaintiff, but that affirmative claim, as stated, is adverse to the defendant, and not to the plaintiff.

While it is true that Mr. Pahwa ultimately seeks return of the money, he is not claiming that plaintiff Recuperos has wrongfully withheld those funds, but instead contends that if those funds are to be returned to defendant, that it would somehow be improper for defendant

to retain the majority of those funds. Accordingly, and based on the foregoing authority, it is clear that the movant is attempting to intervene as a party plaintiff, as his "claim" is as against American Food Stores, LLC. If such intervention is allowed, the diversity of citizenship as among the current parties would be destroyed, since Mr. Pahwa is a resident of California (*see* Dkt. No. 37), and defendant American Food Stores LLC is a California limited liability company (*see* Dkt. Nos. 1 and 21). Accordingly, and in light of the reasoning set forth in *Aeronautical Radio, Inc.* and *Alpha Housing & Health Care, Inc., supra*, the motion to intervene should be denied.

DATED this 21st day of September, 2004.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By /s/ Jason G. Murray
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of September, 2004, I caused a true and correct copy of the foregoing **PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO INTERVENE** to be served by the method indicated below, and addressed to the following:

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